IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

THURSDAY, THE 4TH OCTOBER 2007 / 12TH ASWINA 1929

CRL.A.No. 1152 of 2007(D)

SC.686/2003 of ADDL.DISTRICT AND SESSIONS JUDGE (ADHOC), COURT-I, KOLLAM
CP.189/2002 of JUDL.MAGISTRATE OF FIRST CLASS, KARUNAGAPPALLY

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APPELLANT:

SASI KUMAR, C.NO.1614,
CENTRAL PRISON,
TRIVANDRUM.

BY ADV. BANI P.[STATE BRIEF]

RESPONDENT:

STATE OF KERALA, REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA.

BY PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 4-10-2007 , THE COURT ON 04/10/2007 DELIVERED THE FOLLOWING:

K. Thankappan, J.

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Crl. A. No. 1152 of 2007

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Dated this the 4th day of October, 2007

JUDGMENT

Appellant challenges the judgment in S.C.No.686/2003 on the file of the Court of the Addl. District and Sessions Judge (Adhoc) Court-I, Kollam. By the impugned judgment the appellant was found guilty under section 55(a) of the Abkari Act and he was convicted thereunder and sentenced to undergo rigorous imprisonment for two years and to pay fine of Rs.1,00,000/- and in default to undergo simple imprisonment for a period of six months. As per the evidence of PWs.1 and 2, Excise Inspector and Preventive Officer respectively, the appellant was found in possession of five litres of arrack. In Ext.P1 mahazar it is recorded that the appellant was found in possession of 5 litres of arrack in MO1 can. MO1 can was seized from the appellant, sample was taken and the same was labelled and sealed in the presence of PWs.3 and 4 independent witnesses. The trial court found that the prosecution had succeeded in proving that the appellant was found in possession of five litres of arrack in violation of the provisions of the Abkari Act.

2. The contention of the learned counsel for the appellant is that the trial court ought not have placed reliance on PWs.1 and 2, the official witnesses, as PWs.3 and 4 independent witnesses were turned hostile to the prosecution. The further contention is that there are contradictions in the evidence of PWs.1 and 2 regarding the sample taken. PW1 stated that the bottles were taken from the shop, whereas PW2 had stated that the bottles were already in the jeep. Lastly it is contended that in the light of decisions reported in Surendran V.State of Kerala (2004(1) KLT 404 and Sudhepan @ Aniyan V. State of Kerala (2005(2) KLT (Cri) 631) , the finding of the trial court that the appellant had committed an offence punishable under section 55(a) of the Abkari Act is not tenable.

3. The trial court mainly relied on the evidence of PWs.1 and 2 to find the appellant guilty under section 55(a) of the Abkari Act. The trial court has also relied on the evidence of PW5 Excise Inspector who continued the investigation and filed the final charge. Though the appellant had set up a case in his 313 statement that the case was foisted against him, his case has not been considered by the trial court. The first contention raised by the appellant is that the trial court has committed serious error in accepting the evidence of PWs.1 and 2 , as the independent witnesses were turned hostile to the prosecution. There is no legal bar to prove the case

through the evidence of official witnesses, if their evidence is free from any infirmity. PWs.1 and 2 had given evidence before the court that the appellant was found in possession of MO1 can which contained 5 litres of arrack. Though these witnesses were cross-examined at length, their evidence has not been shattered. The case suggested by the appellant that the case was foisted against him is also not sustainable, as the evidence of PWs.1 and 2 would prove that the appellant was found in possession of five litres of arrack. Evidence of Pws.3 and 4 would show that they were signatory of Ext.P1 mahazar. As per Ext.P5 report, the sample contained 49.52% of ethyle alcohol by volume. In the above circumstances, this Court is of the view that the trial court is fully justified in relying on the evidence of PWs.1 and 2.

4. Next question to be considered is that as per the principle laid down in Surendran's case (Supra) and Sudhepan's case (Supra), the finding of the trial court that the appellant committed an offence punishable under section 55(a) of the Abkari Act is not sustainable. In In Surendran 's case (Supra) a Division of this Court held that when a person is in "possession of illicit liquor" while illegally importing it, the case would be covered under section 55(a) of the Abkari Act and in a case where the possession is of illicit liquor the case would fall within section 58 of the Abkari Act. In

Sudhepan @ Aniyan (Supra) this Court held that under section 55(a) the prosecution must allege and prove that possession of the contraband liquor was incidental or in connection with export, import, transport or transit of liquor. As per the provisions of the Abkari Act, the prosecution should prove that the article was found in possession of the accused was in connection with export, import, transport or transit of liquor. In the light of the above, this Court is of the view that the finding of the trial court that the appellant had committed an offence punishable under section 55(a) of the Abkari Act is not sustainable. After considering the entire evidence, the trial court found that the prosecution had proved that the appellant was found in possession of five litres of arrack.. The prosecution in this case has not proved that the possession of the contraband article was incidental or in connection with export, import, transport or transit of liquor. Section 8(1) of the Abkari Act deals with prohibition of manufacture, import, export, transport, transit, possession, storage, sales, etc. of arrack. As per section 8 (1) of the Abkari Act, no person shall manufacture, import, export, transport, without permit transit, possess, store, distribute, bottle or sell arrack in any form. Hence, offence under section 8(1) and (2) of the Abkari Act is, therefore, attracted in the facts and circumstances of this case. Therefore, the appellant is found guilty under section 8(1) of the Abkari

Act, punishable under section 8(2) of the Abkari Act .

5. The next question to be considered is with regard to the sentence awarded against the appellant. The possession of arrack in contravention of the Act or of any rule or order made under the Act shall not be encouraged by giving smaller punishment. However, the fact that the incident happened during the year 1998 and the fact that the possession of arrack is five litres, this Court is of the view that sentence of rigorous imprisonment for two years and to pay a fine of Rs.1,00,000/- and in default of payment of fine to undergo simple imprisonment for six months under section 8(2) of the Abkari Act will meet the ends of justice. Hence, the appellant is sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs.1,00,000/- and in default of payment of fine to undergo simple imprisonment for six months. Benefit under section 428 Crl.P.C. is entitled to the appellant.

With the above modification, the appeal is dismissed.

K. Thankappan,
Judge.

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K. Thankappan,J.

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Crl.A. No. 1152 of 2007

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Judgment

4-10-2007